Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

87-1297

No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN DAVID ABLE, a minor under the age of fourteen (14) years, by his guardian ad litem, Gloria E. Day,

Petitioner,

versus

THE UPJOHN COMPANY, INC.,

Respondent,

and

JAMES H. BLAIR,

Defendant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the District Court lacks diversity jurisdiction of a case improperly removed from state court, and where the District Court erroneously denies plaintiff's motion to remand, may the District Court's refusal to remand be reviewed on appeal from final judgment, or must the party seeking remand pursue an interlocutory appeal from the refusal to remand?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 829 F.2d 1330. The orders of the District Court for the District of South Carolina are unreported. The opinion of the Court

of Appeals is attached as Appendix A. The orders of the District Court are attached as Appendices C, D and E.

JURISDICTION

The decision of the Court of Appeals was rendered on October 1, 1987. Appellant's petition for rehearing was denied by order of November 2, 1987. The decision of the Court of Appeals is subject to certiorari review by virtue of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT

Petitioner is an eight-year-old child who was born without limbs. He brought this action in the Court of Common Pleas for Richland County, South Carolina, against The Upjohn Company, Inc., a Michigan corporation, and James H. Blair, M.D., who, like petitioner, was a South Carolina citizen. Petitioner alleged that his birth defects were caused by his mother's use of a drug called Provera,

manufactured by Upjohn and prescribed by Dr. Blair.

Although complete diversity of citizenship was lacking, Upjohn removed the case to District Court, claiming that petitioner's complaint stated a "separate and independent claim" as to it, within the meaning of 28 U.S.C. § 1441(a).

Petitioner moved the District Court to remand the case to state court, on the ground that the complaint stated a single cause of action against Upjohn and Dr. Blair as joint tortfeasors. By order dated April 15, 1986, the District Court denied the motion to remand. Three months later, however, by order of July 15, 1986, the District Court remanded to state court the case against Dr. Blair only, retaining the case against Upjohn.

Upjohn's motion for summary judgment was granted, based upon the Fourth Circuit's 1984 prediction that South

Carolina would follow the "learned intermediary" doctrine, which absolves drug manufacturers from negligence liability to patients, provided that the manufacturer has warned the treating physician of dangers associated with the drug's use. See Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir. 1984).[1]

Petitioner appealed from the final judgment for Upjohn, contending that the District Court erroneously failed to grant petitioner's motion to remand the case to state court.

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[1] Keeping the case in Federal Court was crucial to Upjohn's success on the merits. Realistically, only the South Carolina Supreme Court could have rendered a judgment favorable to the plaintiff, either by refusing to adopt the "learned intermediary" doctrine, or by carving an exception appropriate to the facts of this case. See, e.g., MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985); F. Fern, "The Decline and Fall of the Learned Intermediary Doctrine," 28 For the Defense 10 (1986).

The Fourth Circuit Court of Appeals agreed that the District Court should have granted the remand motion, since the case against Upjohn was not a "separate and independent claim or cause of action" but was part of petitioner's single cause of action against the drug manufacturer and the treating physician for negligence resulting in a single harm. The Court of Appeals, however, held that petitioner waived his right to complain of the erroneous refusal to remand the case, when petitioner failed to seek an interlocutory appeal under 28 U.S.C. § 1292(b). The Court of Appeals found that a litigant who does not seek a discretionary appeal under Section 1292(b) runs the risk that complete diversity of citizenship may exist at the time of final judgment, thereby rendering harmless the erroneous failure to remand the case initially.

ARGUMENT

In holding that the refusal to remand an improperly removed case must be appealed immediately, the Court of Appeals has converted 28 U.S.C. § 1292(b) from a discretionary authorization into a compulsory mandate. The Court of Appeals' decision conflicts with the decision of the Third Circuit in The Alligator Company v. La Chemise Lacoste, 506 F.2d 339 (3rd Cir. 1975), cert. den., 421 U.S. 937, 95 S.Ct. 1666, 44 L.Ed.2d 94 (1975) (three Justices dissenting). The Court of Appeals cited in support of its decision two cases from the Ninth Circuit, neither of which lends sound support to the decision.

The Court of Appeals misconstrued the decision of this Court in American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 S.Ct.

534, 95 L.Ed.2d 702 (1951). In the Finn case, the court observed:

> There are cases which uphold judgments in the district courts even through there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied upon as the foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with a jurisdiction it could not possess.

341 U.S. at 10. Three of the four cases cited by the Court in Finn were cases which could have been brought originally in the District Court. In all three of these, a defective removal was deemed

harmless error, and the removing party was estopped to complain. Baggs v. Martin, 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155 (1900); Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435 (6th Cir. 1924); Bailey v. Texas Co., 47 F.2d 153 (2d Cir. 1931). In the fourth case cited, Toledo, St. L. & W.R.R. v. Perenchio, 205 F. 472 (7th Cir. 1913), plaintiff sued a diverse defendant and a nondiverse defendant in state court. The diverse defendant removed, claiming a separable controversy as to itself. Once in federal court, plaintiff voluntarily dismissed his action against the nondiverse defendant. The diverse defendant lost, then claimed on appeal that his own removal was improper, after all, since the controversy was nonseparable. The Court refused to hear the defendant attack his own removal, where complete diversity existed at trial

by virtue of plaintiff's voluntary dismissal of the nondiverse defendant. These facts are a far cry from those of the case at bar. Here, petitioner did not voluntarily dismiss Dr. Blair. The District Court erroneously severed the case and sent Dr. Blair back to state court. The District Court could have done this under 28 U.S.C. § 1441 only if petitioner's case against Upjohn were a separate and independent cause of action, which it plainly was not.

In holding that an interlocutory appeal from a refusal to remand is compulsory, the Fourth Circuit has not only placed itself in conflict with the Third Circuit, but has adopted an unsound interpretation of 28 U.S.C. § 1292(b). By holding that a litigant must pursue an interlocutory appeal from the denial of a remand motion, the decision below inevitably forces the proliferation of

needless interlocutory appeals by worried litigants who can no longer rely upon the axiom that interlocutory appeals are never compulsory, and that the statutory policy is to encourage a single appeal from the final judgment.

CONCLUSION

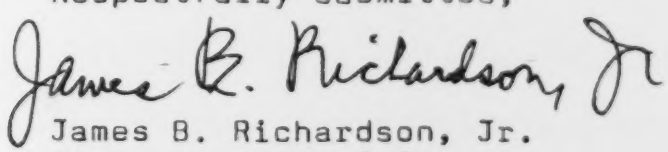
The Fourth Circuit's decision allows a District Court to manufacture diversity jurisdiction for itself by erroneously denying a remand motion, refusing to certify an interlocutory appeal, then erroneously remanding the case against the nondiverse defendant only.

Petitioner raised at the first and only appeal -- the appeal from final judgment -- the District Court's admittedly erroneous failure to remand the case for lack of jurisdiction.

The Fourth Circuit's decision holds that two erroneous orders of the District Court served to give it jurisdiction of this case -- first by refusing to remand the case to state court, and then by erroneously severing the case against the nondiverse defendant and remanding that defendant alone to state court. This is surely an unsound holding, but more important and worse is the holding that a litigant is compelled to seek an interlocutory appeal, on pain of being deemed to have waived his right to complain of lack of subject matter jurisdiction.

For these reasons petitioner urges the Court to grant the writ.

Respectfully submitted,



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APPENDIX

A. Opinion of the Court of Appeals ... 14

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APPENDIX "A"

Cecelia Seeby ABLE; Daniel Albert Able; John David Able, a minor under age of fourteen (14) years, by his guardian ad litem, Gloria E. Day, Plaintiff-Appellant,

v.

The UPJOHN COMPANY, INC., Defendant-Appellee,

and

James H. Blair, Defendant.

No. 86-2674.

United States Court of Appeals, Fourth Circuit.

Argued May 7, 1987.

Decided Oct. 1, 1987.

Before RUSSELL and WILKINSON, Circuit Judges, and HOFFMAN, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

WILKINSON, Circuit Judge:

John David Able appeals from the entry of summary judgment against him in his suit against The Upjohn Company,

Inc. Able argues that the district court lacked subject matter jurisdiction because the removal of his case to federal court was improper under 28 U.S.C. § 1441(c). Although we find merit in Able's claim that removal was improper under § 1441(c), we nonetheless affirm the judgment. The posture of the case at the time of judgment supports the exercise of federal jurisdiction, and we do not believe that the judgment of the district court should be disturbed solely on the basis of a defect in removal.

I.

In July 1978, Cecelia Seeby Able consulted her obstetrician-gynecologist, James H. Blair, M.D., because her menstrual periods had been late. After performing a pregnancy test, which proved negative, Blair prescribed Upjohn's drug Provera for Mrs. Able's condition. Approximately ten days later, Mrs. Able

returned to Dr. Blair, and at that time tests showed that Mrs. Able was pregnant. On February 14, 1979, Mrs. Able's son, plaintiff John David Able, was born with severe birth defects.

The Ables began the litigation that is the subject of this appeal in 1985 by filing three separate suits in the courts of their home state, South Carolina. Mrs. Able, her husband Daniel Albert Able, and Able each filed identical claims against Upjohn, a Delaware corporation with its principal place of business in Michigan. The suits alleged negligence, breach of express and implied warranties, and sale of a defective product. Able later partially withdrew several specifications of wrongdoing in his complaint against Upjohn, leaving only a claim that Upjohn had failed to warn his mother of the risk of birth

defects posed by use of Provera during pregnancy.

Able's suit -- but not his parents' -- also named as a defendant Blair, a South Carolina citizen. Able's suit against Blair alleged negligence in administering Provera, negligence in failing to take proper steps once he realized that he had administered Provera to a pregnant woman, and failure to counsel Mrs. Able that her use of Provera had created a greater than normal possibility that her child would be born with limb reduction defects. Able asked for "actual and punitive damages from both defendants in the amount of Ten Million ($10,000,000) Dollars."

Upjohn removed all three of the suits to the United States District Court for the District of South Carolina in April 1985. Upjohn based the removal on 28 U.S.C. § 1441(c), which allows a

defendant of diverse citizenship to remove a case in which complete diversity of citizenship is lacking where the claim against the diverse defendant is "separate and independent" from claims against non-diverse defendants. Able moved to remand his entire case to state court, arguing that removal under § 1441(c) was improper and that the district court therefore lacked subject matter jurisdiction over the suit due to the absence of complete diversity. The district court denied Able's motion to remand the entire case, but severed the claim against Blair and remanded it to state court under the discretion granted by § 1441(c). Able did not pursue an interlocutory appeal of the district court's denial of his remand motion.

In August 1986, Upjohn moved for summary judgment in all three of the cases,

which the district court had consolidated. In November 1986 the district court granted Upjohn's summary judgment motion in all three cases, principally on the authority of Brooks v. Medtronic, 750 F.2d 1227, 1231 (4th Cir. 1984) ("If the prescribing physician has received adequate notice of possible complications [from the drug], the manufacturer has no duty to warn the consumer."). Able appeals only the district court's application of § 1441.

II.

Able makes a persuasive argument that the removal of his suit to federal court was improper. We doubt seriously that Able's claim against Upjohn constituted the "separate and independent claim or cause of action" required for removal under 28 U.S.C. § 1441(c). Both the policies underlying § 1441(c) and the

case law construing it would have supported a remand of this case to state court.

Congress intended to restrict the right of removal when it substituted the present § 1441(c) for the old 28 U.S.C. § 71 in 1948. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 10, 71 S.Ct. 534, 538, 95 L.Ed. 702 (1951). Our reading of the removal statute must reflect the clear congressional intention to restrict removal. Id. This congressional desire to restrict removal has been understood to require that doubts about the propriety of removal be resolved in favor of retained state court jurisdiction. See, e.g., Greenshields v. Warren Petroleum Corp., 248 F.2d 61, 65 (10th Cir. 1957).

The language of the leading case on what constitutes a "separate and independent claim or cause of action" bolsters the argument against removal here. In American Fire & Casualty Co. v. Finn, the Court stated that no separate and independent claim is shown where the plaintiff

> suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

341 U.S. at 13, 71 S.Ct. at 539-40 (quoting Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927)).

The fact that Able advances multiple theories of liability against multiple defendants does not mean that he has stated separate and independent actions. Able has alleged a violation of the "single primary right" of bodily integrity, claiming recovery for the birth defects caused by his mother's use of Provera. The injury is a single one, for which only one recovery could be had. See Garner v. Wyeth Laboratories, Inc., 585 F.Supp. 189, 192 (D.S.C. 1984).

The existence of separate and independent actions on these facts is also doubtful because Able's two claims involve "substantially the same facts and transactions." Finn, 341 U.S. at 14, 71 S.Ct. at 540. The entire course of Mrs. Able's treatment with Provera was at issue in this case, and common facts would be necessary to show the negligence both of Upjohn and Blair with respect to this

drug. The facts in this case surround a single series of events leading to a single injury, not separate events and separate injuries that are "spatially and chronologically distinct." Lemke v. St. Margaret Hospital, 552 F.Supp. 833 (N.D. Ill. 1982).

This case is not like those where claims have properly been found separate and independent, such as suits against both a tortfeasor and the doctor who treated the injuries caused by the tortfeasor. This case is one in which two defendants were sued over a single chain of activity in which they were both involved. Compare Dorfman v. E. R. Squibb & Sons, Inc., 617 F.Supp. 496 (D.C.Pa. 1985) (claims by brain damaged infant against delivering obstetricians and against manufacturer of diethylstibesterol taken by his grandmother twenty-five years earlier

held separate and independent) and Leinberger v. Webster, 66 F.R.D. 28 (E.D.N.Y. 1975) (claims by plaintiff injured in auto accident against driver of car and against physician who later treated plaintiff held separate and independent) with Luebbe v. Presbyterian Hospital, 526 F.Supp. 1162 (S.D.N.Y. 1981) (claims by injured surgical patient against operating surgeon and against manufacturer of instrument used in surgery held not separate and independent) and Bowerman v. Tomhave, 414 F.Supp. 7 (E.D.Pa. 1975) (claims by injured user of intrauterine device against manufacturer of device and doctor who inserted it held not separate and independent).

Of course, clear lines are difficult to draw. Cases present a spectrum of circumstances, not two clearly defined categories of the removable and non-

removable. Nonetheless, removal in this case was of dubious propriety. The district court should have returned the entire case to state court.[1]

III.

Despite the doubts we have expressed about the initial propriety of the

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[1] As a separate argument in support of the propriety of removal in this case, Upjohn states that Blair was improperly joined as a party under South Carolina law and could be disregarded for purposes of removal. We reject this argument. Construction of the removal statutes is purely a matter of federal law. Courts must look to federal criteria, "irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." Grubbs v. General Electric Credit Corp., 405 U.S. 699, 705, 92 S.Ct. 1344, 1349, 31 L.Ed.2d 612 (1972) (quoting Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941)). South Carolina joinder law is simply immaterial to the question whether removal was proper here. See Gardner and Florence Call Cowles Foundation v. Empire, Inc., 754 F.2d 478, 481 n. 4 (2d Cir. 1985); Paxton v. Weaver, 553 F.2d 936, 940-41 (5th Cir. 1977) (to make state rules determinative would be to add undue confusion to a field that already "luxuriates in riotous uncertainty").

removal, we nonetheless affirm the district court. The Supreme Court has recognized that a judgment entered in a case that was improperly removed may stand where, as here, the judgment works no expansion of federal jurisdiction. Interests of finality and judicial economy also strongly suggest that the district court's judgment should not be disturbed where a party fails to avail himself of a remedy that might earlier have resolved the removal question. At this late stage in the proceedings, the judgment should stand.

American Fire & Casualty Co. v. Finn once again guides our resolution of this case. The Supreme Court there recognized that

> [t]here are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in

> the federal court in the posture it had at the time of the actual trial of the cause or the entry of judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.

341 U.S. at 16, 71 S.Ct. at 541. Here, at the time summary judgment was granted, the parties remaining in the controversy were of diverse citizenship and the amount in controversy exceeded $10,000. The case would therefore have been within the original jurisdiction of the federal court had it been brought there in the posture it had at the time of judgment. As the Court implicitly recognized in Finn, affirmance of the district court's judgment here does not "endow it with a jurisdiction it could not possess." See id. at 18, 71 S.Ct. at 542.

In order to preserve his challenge to the removal in this case, Able should have pursued an interlocutory appeal under 28 U.S.C § 1292(b) after the denial of his remand motion. See Gould v. Mutual Life Insurance Co., 790 F.2d 769, 773 (9th Cir. 1986). When a party elects to forego an interlocutory appeal, he runs the risk that the federal court will enter judgment on the basis of complete diversity. See id.; Sheeran v. General Electric Co., 593 F.2d 93, 97 (9th Cir. 1979). This rule forces parties to give careful consideration to the importance of their objection to removal, but brings the benefit of early determination of the proper forum.

Able's argument that certification of an interlocutory appeal provides an insufficient remedy because certification under § 1292(b) is controlled by the district court lacks merit. Although

certification under § 1292(b) is not a matter of right, parties objecting to removal have made use of § 1292(b) in many cases. See, Union Planters National Bank v. CBS, Inc., 557 F.2d 84 (6th Cir. 1977); Climax Chemical Co. v. C. F. Braun & Co., 370 F.2d 616 (10th Cir. 1966); Charles Dowd Box Co., Inc. v. Fireman's Fund Insurance Co., 303 F.2d 57 (1st Cir. 1962). This rule does not, as Able suggests, allow district courts to "manufacture jurisdiction" by accepting an improper removal, denying certification, remanding non-diverse parties, and entering judgment on the remaining claims. Our holding is not a rigid one, and should a district court deny certification in a case where the propriety of removal is doubtful, we would examine an appeal in light of that fact.

Here, judicial economy and finality require that the district court's judgment be allowed to stand. Where a matter has proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal would be a waste of judicial resources. See Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972). Although the interest in judicial economy is most pressing where an action has proceeded to trial, we feel that the same considerations are applicable to summary judgment. See Stone v. Stone, 632 F.2d 740, 742 (9th Cir. 1980). Able has failed to show that reversal is warranted at this late date.

The judgment of the district court is AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 86-2674

Cecelia Seeby Able, et al,
Appellants,

versus

The Upjohn Company, Inc., Appellee,

and

James H. Blair,
Defendant.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Hoffman, Senior United States District Judge, sitting by designation.

For the Court,

/s/ JOHN GREACEN
CLERK

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JOHN DAVID ABLE, a minor under age of fourteen (14) years, by his guardian ad litem, GLORIA E. DAY, Plaintiff, -vs- THE UPJOHN COMPANY, INC., and JAMES H. BLAIR, M.D., Defendants.	)	CIVIL ACTION NO. 3:85-953-0 ORDER

This matter is before the Court pursuant to the motion of the plaintiff to remand this case to the Richland County Court of Common Pleas. Upon consideration of the motion, the memoranda and the arguments made, the motion is hereby denied.

IT IS SO ORDERED.

/s/_____
MATTHEW J. PERRY
UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina,
April 15, 1986.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
CIVIL ACTION NO. 3:85-953-0

John David Able, a minor under age of fourteen (14) years, by his guardian ad litem, Gloria E. Day, Plaintiff, -vs- The Upjohn Company, Inc., and James H. Blair, M.D., Defendants.	ORDER

This action was instituted in the Court of Common Pleas for Richland County, State of South Carolina, by Plaintiff, a resident of South Carolina, against Defendant James H. Blair, M.D., also a resident of South Carolina, and against the Defendant Upjohn Company, a foreign corporation. Defendant Upjohn timely removed the action to this Court,

under the provisions of Title 28 U.S.C. § 1441(c), on the ground that the claims asserted against Defendant Upjohn are separate and independent from the non-removable claim asserted against Defendant Blair. Thereafter, Plaintiff moved to remand the entire action to the State Court for lack of diversity, and Defendant Blair moved pursuant to § 1441(c) that the non-removable claim asserted against him be severed from the removable claims asserted against Defendant Upjohn and remanded to state court.

The motions were presented to and fully argued before this Court on April 15, 1986. After hearing arguments of counsel for all parties, this Court concluded that the claims asserted by Plaintiff against Defendant Upjohn are separate and independent claims from those asserted against Defendant Blair and were properly removed to this Court. Plain-

tiff's motion to remand the entire action was accordingly denied.

However, with respect to the separate, independent, and non-removable claim asserted against Defendant James H. Blair, M.D., this Court concluded, in the exercise of the discretion granted it by the provisions of §1441(c) that the claim against Defendant Blair should be remanded to the Court of Common Pleas for Richland County.

There are two other related actions against only the Defendant Upjohn pending in this Court (Civil Action Nos. 3:85-705-0 and 3:85-706-0) that were instituted by the parents of the minor plaintiff in the instant action. These two companion actions are properly before this Court, cannot be remanded, and they arise from the same facts and circumstances and present the same claims against Defendant Upjohn as are alleged here. Thus, if the

non-removable claim alleged against Defendant Blair is remanded, the three companion actions can be easily consolidated for disposition here. Additionally, a prior action entitled Able v. The Upjohn Company (Civil Action No. 83-971-O) was voluntarily dismissed by Plaintiff without prejudice on December 19, 1984, after Defendant Upjohn moved for a summary judgment, and by this Court's Order filed in the instant action on October 24, 1985, with the consent of counsel for Upjohn and the Plaintiff, all depositions, affidavits and other discovery of the former dismissed action were made applicable to them for use in this and the two pending companion actions. However, since Defendant Blair was not a party to the prior dismissed action, he could not be

subjected to or bound by the prior discovery undertaken by Plaintiff and Defendant Upjohn.

For the above reasons, this Court concludes, in the discretion granted it pursuant to §1441(c), that the separate, independent and non-removable claim asserted against Defendant James H. Blair, M.D. should be and hereby is remanded for further proceedings to the Court of Common Pleas for Richland County, State of South Carolina.

IT IS SO ORDERED.

Columbia, S.C.
July 15, 1986.

/s/
Matthew J. Perry
United States
District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CECELIA SEEBY ABLE, Plaintiff, -vs- THE UPJOHN COMPANY, INC., Defendant.	CIVIL ACTION NO. 3:85-705-0
DANIEL ALBERT ABLE, Plaintiff, -vs- THE UPJOHN COMPANY, INC., Defendant.	CIVIL ACTION NO. 3:85-706-0
JOHN DAVID ABLE, a minor under age of fourteen (14) years, by his guardian ad litem, GLORIA E. DAY, Plaintiff, -vs- THE UPJOHN COMPANY, INC., Defendants.	CIVIL ACTION NO. 3:85-953-0 ORDER

These cases are before the Court pursuant to the motion of the defendant, The Upjohn Company, Inc., for summary judgment in its favor. For the following reasons, the motion is granted.

I.

In July of 1978, the plaintiff, Cecelia Seeby Able, consulted her obstetrician-gynecologist, James H. Blair, M.D., concerning her late menstrual periods. Dr. Blair examined Mrs. Able, gave here a pregnancy test, and concluded that she was not pregnant. He then prescribed Provera, a prescription drug manufactured by the defendant, The Upjohn Company, Inc. (Upjohn), to treat Mrs. Able's condition. Approximately ten days after the first examination, Mrs. Able returned to Dr. Blair because her menstrual period had not yet begun. On February 14, 1979 Mrs. Able's son, the plaintiff John David Able, was born with

severe limb reduction birth defects. Thereafter, the plaintiffs brought the instant products liability actions against Upjohn, alleging negligence, breach of warranty, and strict liability for Upjohn's failure to warn Mrs. Able that Provera might cause a greater than normal risk of limb deficiencies in a child exposed in utero to the drug; for Upjohn's failure to warn Mrs. Able that she should consult her physician if she learned that she was pregnant while taking Provera; and for Upjohn's failure to warn Dr. Blair to take steps adequate to remind himself that Provera had been administered to a patient who was subsequently found to have been pregnant. Upjohn now moves for summary judgment in all three cases on the ground that the complaints fail to state claims upon which relief can be granted. Upjohn also moves for summary judgment in the cases

brought by Cecelia Seeby Able and Daniel Albert Able on the ground that those actions are barred by the statute of limitations. The Court will only address Upjohn's first contention.

Upjohn contends that the warnings given in this case were adequate. At the time that Dr. Blair prescribed Provera for Mrs. Able, Upjohn had issued the following warning concerning the drug:

> WARNING
>
> THE USE OF PROGESTATIONAL AGENTS DURING THE FIRST FOUR MONTHS OF PREGNANCY IS NOT RECOMMENDED.
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> Progestational agents have been used beginning with the first trimester of pregnancy in an attempt to prevent habitual abortion or treat threatened abortion. There is no adequate evidence that such use is effective and there is evidence of potential harm to the fetus when such drugs are given during the first four months of pregnancy. . . . Therefore, the use of such drugs during the first four months of pregnancy is not recommended.

> Several reports suggest an association between intrauterine exposure to female sex hormones and congenital anomalies including congenital heart defects and limb reduction defects. One study estimated a 4.7- fold increased risk of limb reduction defects in infants exposed in utero to sex hormones. . . . Some of these exposures were very short and involved only in a few days of treatment. . . . (Footnotes omitted.)
>
> If the patient is exposed to Provera . . . during the first four months of pregnancy or if she becomes pregnant while taking the drug, she should be apprised of the potential risks to the fetus.

The above warnings were contained in a box under the heading "Provera Tablets" on page 1720 of the 1978 edition of the Physicians' Desk Reference, which is a reference volume published annually, with intermediate supplements, containing the prescribing information and warnings for prescription drugs. In addition to the above warnings, the Physicians' Desk Reference also contained the following under the heading "Warnings": "Usage in

pregnancy is not recommended (See WARNING BOX). Under the heading "Adverse Reactions," there was stated: "Pregnancy - (See WARNING BOX for possible adverse effects on the fetus)." Upjohn has submitted the affidavit of Dr. Blair, which indicates that at the time Dr. Blair prescribed Provera for Mrs. Able he was specifically familiar with Upjohn's warnings in the Physicians' Desk Reference concerning Provera, including the recommendation that the drug not be administered to patients in the first trimester of pregnancy. In Dr. Blair's opinion, the warnings given by Upjohn were adequate to warn him and the medical profession of the dangers associated with Provera.

Upjohn contends that because Provera is a drug which may only be obtained by prescription, it had no duty to warn Mrs.

Able, the patient, of any risks or contra-indications associated with Provera. Rather, Upjohn argues, its only duty was to warn Dr. Blair, the treating physician, of the risks involved.

The Fourth Circuit has addressed this issue. In Stanback v. Parke, Davis and Company, 657 F. 2d 642 (4th Cir. 1981), the court stated: "[T]he well-settled rule is that the duty an ethical drug[1] manufacturer owes to the consumer is to warn only physicians (or other medical personnel permitted by state law to prescribe drugs) of any risks or contra-indications associated with that drug." 657 F.2d at 644. In a subsequent case, Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit, in a

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[1] An ethical drug is one obtained by prescription, rather than a drug sold over the counter. Stanback, 657 F.2d at 644 n. 1.

diversity action arising under South Carolina law, reaffirmed the rule in Stanback:

> If the prescribing physician has received adequate notice of possible complications, the manufacturer has no duty to warn the consumer. In that instance, the physician is called on to act as a "learned intermediary" between the manufacturer and the consumer because he is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment. . . . Although the South Carolina Supreme Court has not addressed the issue, we conclude it would adopt the rule, generally accepted and supported by sound policy, restricting the manufacturer's duty to warn to the prescribing physician.

750 F.2d at 1231.

Plaintiffs nevertheless contend that this Court should adopt the rule stated in the case of Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867 (E.D. Mich. 1985). In that case, the court

made an exception to the "learned intermediary" rule and held that the manufacturer of oral contraceptives has the duty to warn not only physicians, but also the ultimate consumer, of the possible side effects associated with the drug. However, the court limited its holding to contraceptives only and distinguished contraceptive drugs from other prescription drugs, since a patient's involvement in the decision to use oral contraceptives is much greater than in the case of other prescription drugs, there is minimal supervision of the patient by the physician when oral contraceptives are prescribed, and the rejection of an oral contraceptive by a patient is not life threatening. In the case of other prescription drugs such as Provera, the patient does not elect whether or not to use the drug; only the physician is qualified to decide what to

prescribe for the patient's condition. Furthermore, a patient takes prescription drugs other than contraceptives under the supervision of a physician. Since the reasons given for the exception to "learned intermediary" rule by the court in Odgers do not apply to the facts of this case, this Court declines to adopt the rule stated in Odgers.

The issue in this case, therefore, is whether the warnings given by Upjohn to Dr. Blair were adequate to warn him of the risks associated with Provera. Upjohn's warnings in the Physicians' Desk Reference, specifically referred to studies indicating a greater than normal incidence of birth defects in children exposed to drugs similar to Provera while in utero. The warnings further stated that Provera should not be administered to patients in the first trimester of

pregnancy. Dr. Blair used the Physicians' Desk Reference to keep informed about prescription drugs, and he was specifically familiar with the defendant's warning not to administer Provera to patients who were pregnant. In Dr. Blair's opinion, Upjohn's warnings were adequate to warn him and the medical profession of the risks associated with Provera.

The Court therefore concludes that Upjohn's warnings to Dr. Blair, the prescribing physician, were adequate and that Upjohn had no duty to warn Mrs. Able directly of the risks associated with Provera. Consequently, Upjohn cannot be held liable for failure to warn Mrs. Able.

Plaintiffs also allege that Upjohn should be held liable for failure to warn

Dr. Blair to take steps adequate to remind himself that Provera had been administered to a patient who was subsequently found to have been pregnant; Upjohn's warnings in the Physicians' Desk Reference specifically stated: "If the patient is exposed to Provera (medrozyprogesterone acetate) during the first four months of pregnancy or if she becomes pregnant while taking the drug, she should be apprised of the potential risks to the fetus." As the Fourth Circuit stated in Brooks v. Medtronic, Inc.:

> [T]he physician is called on to act as a "learned intermediary" between the manufacturer and the consumer because he is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment. . . . It is the physician's duty to remain abreast of product characteristics and, exercising an informed professional judgment, decide which facts should be told to the patient.

750 F.2d at 1213-32. Since it is the physician's duty to remain informed about drugs, to decide what should be told a patient, and to apprise a patient of potential harm to the fetus if she takes Provera during pregnancy, it is also the physician's duty to keep patient records adequate to inform him or her that the or she gave Provera to a patient who later became pregnant. The Court is unaware of any case holding that a drug manufacturer has the duty to instruct a physician how to keep his or her records. Therefore, the Court concludes that Upjohn cannot be held liable for failure to warn Dr. Blair to remind himself that he has prescribed Provera to a patient who later became pregnant.

III.

For the foregoing reasons, Upjohn's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/s/_____
MATTHEW J. PERRY
UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina.

November 25, 1986.